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This opinion shall not "constitute precedent or be binding upon any court."
Although it is posted on the internet, this opinion is binding only on the
parties in the case and its use in other cases is limited. R. 1:36-3.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0400-15T1

N.M.,

Petitioner-Appellant,

v.

DIVISION OF MEDICAL ASSISTANCE
AND HEALTH SERVICES,

Respondent-Respondent.

Submitted March 5, 2018 – Decided April 4, 2018

Before Judges Messano, Accurso and O'Connor.

On appeal from the New Jersey Department of
Human Services, Division of Medical
Assistance and Health Services.

Schutjer Bogar LLC, attorneys for appellant
(John Pendergast, on the briefs).

Gurbir S. Grewal, Attorney General, attorney
for respondent (Melissa H. Raksa, Assistant
Attorney General, of counsel; Stephen
Slocum, Deputy Attorney General, on the
brief).

PER CURIAM

Petitioner N.M. appeals from a final agency decision of the
Department of Human Services, Division of Medical Assistance and

Health Services (DMAHS), denying her requests for a hardship waiver and a fair hearing. Because the requests were out of time, we affirm.

N.M. became a resident of Hampton Ridge Healthcare and Rehabilitation in April 2013 and appointed Senior Planning Services as her designated authorized representative for Medicaid benefits in July 2013. The Ocean County Board of Social Services notified N.M.'s representative on January 14, 2014 that petitioner's transfer of \$92,500 for less than full market value during the look-back period, presumably to qualify for Medicaid, would subject her to a 354-day transfer penalty extending from June 1, 2013. The notice explained petitioner's right to rebut the presumption by providing evidence the transfer was for some other purpose, and that she could request a waiver of the transfer penalty based on undue hardship, as set forth in N.J.A.C. 10:71-4.10(q), within twenty days.

On February 24, 2014, Ocean County notified petitioner's representative that petitioner was approved for medical assistance for state plan services effective June 1, 2013, but institutional services would not be covered until May 21, 2014, because of the transfer penalty. The notice advised of petitioner's right to request a fair hearing within twenty days in accordance with N.J.A.C. 10:49-10.3.

On October 28, 2014, counsel for Hampton Ridge wrote to DMAHS advising it filed an appeal from the denial of N.M.'s "Medical Assistance" on February 4, 2014 and an application for an Undue Hardship Waiver on her behalf on February 13, 2014 "with the incorrect office." Counsel attached those submittals, addressed to the Ocean County Board of Social Services and asked DMAHS to accept its correspondence "as our formal request to appeal the denial of [N.M.'s] Medical Assistance, along with a filing of Application for Undue Hardship Waiver."

DMAHS responded by letter of November 14, 2014, denying the request for a fair hearing because counsel offered no explanation for its failure to file with DMAHS or to inquire about the filings for eight months, and N.M. had never rescinded her prior designation of Senior Planning Services as her authorized representative.¹ Counsel sent DMAHS another letter in

¹ A paralegal employed by counsel for N.M. contends in a certification attached to its reply brief that the firm never received the letter, which was addressed to an attorney no longer employed by the firm. Because the November 14, 2014 letter was included in the statement of items comprising the record on appeal filed by the agency on December 8, 2015, pursuant to R. 2:5-4, and counsel for N.M. failed to move in the agency to correct or supplement the record pursuant to R. 2:5-5, see High Horizons Dev. Co. v. N.J. Dep't of Transp., 120 N.J. 40, 44 (1990), we do not consider the certification. We note the agency's acknowledgment of counsel's October 28, 2014 letter had no effect on the untimeliness of N.M.'s request for a hardship waiver and a fair hearing in any event.

February 2015, identifying its client as Kathy Granatelli, designated as N.M.'s authorized representative by N.M. in March 2014, and accepted by Granatelli in September 2014, requesting that DMAHS transmit the matter to the Office of Administrative Law for a fair hearing with regard to the notice mailed by Ocean County on January 14, 2014. N.M. filed a notice of appeal in September 2015.

Counsel argues "N.M.'s appeal of the penalty should be automatically granted," based on DMAHS's failure to have "responded to N.M.'s requests for more than two years," and that DMAHS's failure to transfer its request for a fair hearing to the Office of Administrative Law violated federal law. DMAHS counters that it did respond to counsel by letter of November 14, 2014, denying the untimely request for a fair hearing. It further argues the letter counsel sent to the wrong agency requesting a hearing in the OAL on February 4, 2014 could not have been granted even if sent to DMAHS because it sought OAL review of possible future agency action, namely, notice the transfer penalty would be applied unless rebutted by evidence the transfer was made solely for a reason other than Medicaid eligibility, and that its February 13, 2014 request for a hardship waiver would have been rejected as untimely even if filed with DMAHS.

Having reviewed the record, we are satisfied counsel's arguments on behalf of N.M. are without sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E). The twenty-day time period for requesting a hardship waiver of a transfer penalty and a fair hearing in the OAL are clear. See N.J.A.C. 10:71-4.10(q) and N.J.A.C. 10:49-10.3(b). Although the record here is not extensive, it makes plain N.M. did not timely request either a hardship waiver or a fair hearing. An appeal based on agency inaction does not lie from an agency's failure to respond to requests for action filed grossly beyond the time allotted by regulation. Cf. State Dep't of Env'tl. Prot. v. Mazza & Sons, Inc., 406 N.J. Super. 13, 19-20, 23-26 (App. Div. 2009) (prohibiting the defendant from collaterally challenging an administrative order it failed to challenge by the timely request for an administrative hearing).

Affirmed.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.


CLERK OF THE APPELLATE DIVISION